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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 516

BILLY GENE COMPTON,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

Petitioner, Billy Gene Compton, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

The United States District Court for the Western District of Tennessee, Western Division, gave no written opinion. The opinion of the United States Court of Appeals for the Sixth Circuit is set forth in the Appendix, pages 19-27, infra; it has not yet been reported.

JURISDICTION.

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 4, 1966 (Appendix pages 19-27, infra). The jurisdiction of the Court is invoked under 28 U. S. Code 1254 (1).

QUESTIONS PRESENTED.

1. Does 18 U. S. C. A. 1952 delegate the legislative authority reserved to Congress by Article 1, Section 1, Constitution of the United States of America, in that Congress has not defined an essential element of the federal crime prohibited by the act, but has left it to state legislatures and federal courts to determine that essential element, "violation of state law"?

2. Does 18 U. S. C. A. 1952 contravene the 5th Amendment to the Constitution of the United States of America by allowing deprivation of liberty and property without due process in that it allows a federal court and jury to determine what is a violation of a state law to be tried in a federal court?

3. Does 18 U. S. C. A. 1952 invade the rights left to the states by the 10th Amendment to the Constitution of the United States of America by allowing a federal court to decide what action are prohibited in the State of Tennessee concerning matters of purely local concern?

4. Does Congress have authority under Article 1, Section 8, Clause 3 of the Constitution of the United States to impose criminal sanctions on one instance of interstate travel not otherwise in itself unlawful, change of domicile from one state to another, if at the time of travel there is an intent to thereafter violate a state law followed by a violation or attempted violation?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Article 1, Section 1, Constitution of the United States of America. "**Legislative powers vested in congress.**—All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and a house of representatives."

Article 1, Section 8, Clause 3, Constitution of the United States of America. "**Powers of congress.**—The congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Amendment 5, Constitution of the United States of America. "**Criminal actions—Provisions concerning—Due process of law and just compensation clauses.**—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 10, Constitution of the United States of America. "**Rights reserved to states or people.**—The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

18 U. S. C. A. 1952. "**Interstate and foreign travel or transportation in aid of racketeering enterprises.**

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

STATEMENT.

On May 13, 1964, a three count indictment was filed in the Western District of Tennessee, pursuant to 18 U. S. C. A. 3231, charging in Count I that "commencing on or about the 12th day of November, 1963, Billy Gene Compton unlawfully, willfully and knowingly did travel in interstate commerce from the State of Arkansas to Tipton County in the Western District of Tennessee, Western Division, with intent to distribute the proceeds of, and to otherwise promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity, to-wit, The Valley Club, being a business enterprise involving gambling in violation of Sections 39-2002, 39-2003, 39-2004, 39-2006, 39-2031 and 39-2032 of the Tennessee Code Annotated, the law of the State of Tennessee, and thereafter unlawfully, willfully and knowingly performed or attempted to perform acts to distribute the proceeds of said unlawful activity, promote, manage, establish, carry on and facilitate the promotion, management, estab-

lishment and carrying on of said unlawful activity, in violation of Title 18, U. S. C. A., Section 1952.

nm 10,000., or nm 5 yrs., or both" .(R. 3A-5A).

We are not concerned with the other Counts in the indictment, as the District Court directed a verdict of acquittal on Count III (R. 6A, 128A), and the jury returned a verdict of not guilty on Count II (R. 6A, 229A).

The proof showed that in June, 1963, Billy Gene Compton engaged in professional gambling at Blackfish Lake, Arkansas (R. 38A-50A). In late October or early November of 1963, Billy Gene Compton began trying to sell his house in West Memphis, Arkansas, although it was never sold (R. 21A-23A). On November 18, 1963, Billy Gene Compton rented a home in Memphis, Tennessee, and on November 20, 1963, moved with his family from West Memphis, Arkansas to Memphis, Tennessee (R. 52A-58A). On December 2, 1963, Billy Gene Compton became the owner of a club in Tipton County, Tennessee, and began operating it as a gambling club (R. 111A-116A, 142A).

There was other evidence introduced in an attempt to prove Billy Gene Compton induced David McElduff and Donald Crosby to travel in interstate commerce (R. 103A-105A, 113A-118A), and about Billy Gene Compton renting a truck on November 15, 1963, and helping furniture to be moved into the club in Tipton County, Tennessee, of which he later became owner (R. 135A-136A, 160A), but this evidence was not relevant to the issues now before the Court as defendant was only convicted on the basis of moving with his family to Memphis, Tennessee from West Memphis, Arkansas. As the Court of Appeals observed, "The facts for the purpose of this appeal may be briefly stated. The defendant moved his family from West Memphis, Arkansas to Shelby County, Tennessee, on or about November 20, 1963. A few days later he took over

the operation of a gambling club, which he called the Valley Club, in Tipton County, Tennessee. The principal issue at the trial was whether the defendant, in moving or traveling to Tennessee, had the intent to engage in a gambling business in violation of the laws of Tennessee'' (Appendix, infra, page 20).

Billy Gene Compton was found guilty under Count I of violating 28 U. S. C. A. 1952, and sentenced to five years imprisonment and payment of a $5,000 fine (R. 7A, 229A, 230A).

Billy Gene Compton appealed to the United States Court of Appeals for the Sixth Circuit from the judgment filed on November 4, 1964 (R. 10A).

On August 4, 1966, the United States Court of Appeals for the Sixth Circuit reversed the conviction and remanded the case for a new trial, but refused to hold 28 U. S. C. A. 1952 unconstitutional either on its face or in its application to the facts of this case. (Appendix, infra, page 21).

REASONS FOR GRANTING THE WRIT.

I.

The opinion rendered by the United States Court of Appeals for the Sixth Circuit is in conflict with the decision of the United States Court of Appeals for the Fourth Circuit on the same matter.

This case is in conflict with the opinion filed on February 3, 1966, by the United States Court of Appeals for the Fourth Circuit in United States of America v. James Russell Hawthorne, reported in 356 F. (2d) 740.

There, the defendant, Hawthorne, traveled from Indiana to West Virginia on several occasions to make arrangements for operating a gambling business in West Virginia.

On October 11, 1962, defendant traveled with his family from Indiana to West Virginia; ". . . the immediate purpose of this trip was to move Hawthorne's family from Indiana to the new home."

The Court stated:

> "The statute was intended to make interstate travel or transportation in aid of racketeering enterprises a crime.
>
> It is not the intent of the statute to make it a crime per se for one who operates a gambling establishment to travel interstate. To so hold might raise serious questions of the constitutionality of the Act. See Twining v. New Jersey, 211 U. S. 78, 97 (1908); Kent v. Dulles, 357 U. S. 116 (1958); Zemel v. Rusk, 381 U. S. 1 (1965). The government cites no case which supports its position."

In the present case, defendant, Compton, traveled from West Memphis, Arkansas, to Memphis, Tennessee, in November, 1963, for the purpose of moving his family to their new home. The defendant maintained that the Act did not apply to this activity or that, it was unconstitutional if it did. The United States Court of Appeals for the Sixth Circuit summarily disposed of this question as follows:

> "We find no merit to the constitutional questions." (Appendix, infra, page 21.)

In the Fourth Circuit case, Hawthorne moved his family hundreds of miles from Indiana to West Virginia, which was necessary for him to operate his gambling business in West Virginia as it would have been difficult, if not impossible, for him to do so from Indiana. By way of contrast, it was not at all necessary for Billy Gene Compton to move from West Memphis to Memphis, to operate a gambling business in Tennessee, as West Memphis is directly across the Mississippi River from

Memphis, and there would be little, if any, difference in convenience of operation of his gambling club in Tennessee, whether he lived in West Memphis or Memphis.

Nevertheless, the Fourth Circuit in the Hawthorne case recognized that there must be a direct relation between the travel and the illegal activity, that it is not a crime per se for a gambler to travel interstate, and that to so hold would raise serious questions as to the constitutionality of the Act.

We, therefore, have the Fourth Circuit saying that the Act does not apply to this situation and at least implying it would be unconstitutional if it did, while the Sixth Circuit says it does apply and is not unconstitutional to be so applied.

While the decisions of these two Circuits are not as directly in conflict as to the constitutionality of the Act, as they are on the application of the Act, there is no question but that there is a very real and direct conflict as to the applicability of the Act to almost identical factual situations, and a very strong indication of a conflict as to the constitutionality of the Act if interpreted, as the government contends for in the instant case. We, therefore, respectfully submit that this conflict is of considerable public importance and that the writ of certiorari should issue under Rule 19 of this Court to resolve this conflict.

II.

The U. S. Court of Appeals for the Sixth Circuit has decided important questions of federal law, which have not been, but should be, settled by this Court.

18 U. S. C. A. 1952 raises several constitutional questions as applied to Billy Gene Compton. The act prohibits interstate travel with intent to thereafter engage in acts

in violation of state law and thereafter to engage in such acts. The act does not incorporate the state laws that it refers to violating and does not, itself, define the prohibited acts.

We are concerned with the 5th Amendment in that the federal jury must in effect convict the defendant of a state crime to determine there has been a "violation of state law", which denies due process of a state trial, to determine whether a state offense has been committed.

We are concerned with the 10th Amendment in that a federal jury is permitted and even required to determine violation of state law which is a right reserved to the states.

We are concerned with Article 1, Section 1, in that Congress has delegated the legislative function of defining criminal activity to state legislatures and federal courts.

And, we are concerned with Article 1, Section 8, Clause 3, in that the act exceeds the power of Congress to regulate interstate commerce and amounts to a denial of due process, if it prohibits interstate travel, which does not, itself, promote an illegal activity.

This Court has heretofore upheld incorporation of a state law into a federal statute, where the same acts prohibited by state law are defined, by the incorporation, as being federal criminal offenses in United States v. Sharpnock, 355 U. S. 286, with Mr. Justice Douglas and Mr. Justice Black dissenting (page 297) on the basis that to allow incorporation of state laws inacted after passage of the Federal Assimilative Crimes Act, was an improper delegation to the states of the authority granted to Congress under Article 1, Section 1, of the Constitution.

This Court has also upheld the constitutionality of the Mann Act, 18 U. S. C. A. 2421 et seq., and the Dyer Act,

18 U. S. C. A. 2311 et seq., Camminetti v. United States, 242 U. S. 470, Brooks v. United States, 267 U. S. 432.

The Mann Act, supra, and the Dyer Act, supra, do not leave it to the state legislatures or courts to say what is a stolen automobile or what is prostitution; the acts themselves define the terms. The Federal Assimilative Crimes Act, supra, incorporates and adopts the state law as its definition of a federal crime. The exact language is that "whoever . . . is guilty of any act or omission which . . . would be punishable if committed or omitted within the jurisdiction of the State. . . . in which such place is situated, by the laws thereof in force at the time of such act or omission, **shall be guilty of a like offense** and subject to a like punishment." 18 U. S. C. A. 13.

These acts all provide for punishment of certain acts **as federal crimes**; acts which are either defined in the federal act or defined by specifically incorporating state law, but 18 U. S. C. A. 1952 does not define the acts or incorporate state law in regard to an essential element of the federal crime (the thereafter act), defined therein. It does not incorporate state gambling laws by reference, but, instead, provides that "whoever travels in interstate . . . commerce . . . with intent to . . . otherwise promote, manage, establish . . . any unlawful activity, and thereafter performs or attempts to perform any of the acts . . . shall be fined . . . or imprisoned . . .

(b) ". . . 'unlawful activity' means any business enterprise involving gambling . . . **in violation of the laws of the state** in which they are committed . . ."

Therefore, this act is essentially different from the Federal Assimilative Crimes Act and similar acts in that acts prohibited by the states are not incorporated into the federal law and the commission of the act made a federal crime, but, instead, a **violation of state law** is made an essential element of a federal crime.

Violation of state law incompasses more than just the statutory and case law of a state. Before it can be said that there has been a violation of state law, there must first be common law or statutory prohibition of certain acts, an arrest according to state and federal constitutional and statutory requirements, an indictment according to federal constitutional and state requirements, a trial in a Court of competent jurisdiction, with proper state and federal constitutional, common law and statutory safeguards and a verdict of guilty. Only then, can it be said that there has been a violation of state law.

To allow a federal jury to convict the defendant of violating state law, which they must in effect do before they can say there has been a violation of state law, is a denial of due process under the Fifth Amendment to the Constitution of the United States.

There are numerous distinctions between the practice of the federal courts and the courts of Tennessee in criminal cases. (Federal juries may have exhibits in the jury room, Tennessee juries may not. The Tennessee Supreme Court will reweigh the evidence, Federal Appellate Courts will not.)

This is also an invasion of the rights reserved to the states by Amendment X to the Constitution of the United States in that it permits and requires federal juries to determine what conduct is prohibited in a statute without following the state machinery set up for this purpose. Amendment X reserves to the states this right, and we are not here concerned with the exercise of police powers by the federal government, which are merely incidental to a valid federal purpose.

The situation here is different from that in McCoy v. Pescor, 145 F. (2d) 260, and in similar cases where the only determination being made was whether a federal crime, defined by incorporation of state law by reference,

had occurred, and there was not any need to try and determine whether the defendant violated a state law. Here, it is necessary to find a "violation of state law" as an essential element of the "crime" defined in 18 U. S. C. A. 1952. By having this an element of the crime, federal juries are permitted and required to try defendants and determine that they have violated the state law.

Petitioner earnestly submits that the only way the "violation of state law" requirement in the act could be satisfied without infringement on the constitutional guarantees of Amendments V and X, is for the petitioner to have been properly arrested, indicted, tried and convicted in a state court of competent jurisdiction, and evidence of this conviction introduced in his trial for violation of 18 U. S. C. A. 1952.

Had Congress incorporated state law by reference rather than referring to "violation of state law", this pitfall might have been avoided, but this it did not do.

Therefore, we have an act that contravenes Amendments V and X by allowing federal juries to determine a violation of state law. Also, by reason of the failure of Congress to either define the prohibited acts in the Act itself, or by incorporation of state law, this is an improper delegation of authority, and is a much clearer illustration of the evil discussed by Mr. Justice Douglas in United States v. Sharpnock, supra, and by the Court in Schechter Corporation v. United States, 295 U. S. 495, and Youngstown Sheet and Tube Company v. Sawyer, 343 U. S. 579, of delegation of the power granted to Congress under Article 1, of the Constitution of the United States. The authority is not just delegated to state legislatures, but is delegated and diffused down to individual federal juries, who determine there has been a "violation of state law". Even if there had been a state trial where defendant had been convicted, which is the only constitutional

manner of determining there has been a "violation of state law", we would still have congressional authority delegated and diffused to the level of individual state juries.

Even if 18 U. S. C. 1952 did incorporate state law by reference so that it did not contravene Article 1, Section 1, and Amendments V and X; still it would violate Article 1, Section 8, Clause 3, of the Constitution of the United States; if not on its face, then in its application to the petitioner in this case.

Did Congress intend to cover the conduct of appellant in this case? The legislative history does not indicate it did; strict construction required of a criminal statute would not indicate it did and the requirement to construe an act to be constitutional, if possible, would lead to the construction that it does not.

While Congress's power under the commerce clause is broad, still the action sought to be regulated must bear some relationship to interstate commerce.

The Mann Acts and Dyer Act aim at the use of interstate travel in the promotion of crime in that interstate travel aids the criminal in avoiding local prosecution and hinders state officials in their crime fighting efforts. This is clearly a proper domain of Congress under the commerce clause and appears to be the aim of Congress in passing the subject Act. The sub-title "Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises" and the hearings before the Congressional committee would seem to indicate that Congress had that intention and did not intend to cover the situation here present.

(U. S. Code Congressional and Administrative News, Volume 2, 87th Cong. First session, 1961, pages 2664 through 2666.)

Purpose of the Bill.

"The purpose of the bill, as amended, is to amend Chapter 95, Title 18, United States Code, by adding a new section designated 1952, to prohibit travel in interstate commerce or the use of the facilities of interstate or foreign commerce, including the mail, **in the aid of racketeering enterprises** . . .

Statement.

". . . The bill is a part of the Attorney General's crime program to combat **organized crime and racketeering.**

"The Attorney General testified before the committee on May 17, 1961 in support of the bill. In his testimony he cited numerous instances of the use of the facilities of interstate commerce by racketeers and hoodlums to **promote** the illegal enterprises, to distribute the proceeds among the syndicate members of illegal gambling, liquor, narcotics and prostitution businesses and the use of the facilities for the commission of crimes of violence in furtherance of the unlawful activities.

"He spoke of racketeers living in one State and controlling the rackets and reaping the profits from those rackets located in another state. The racketeer would be beyond the control of the police in the state of operation and living as a respected citizen in the State of his abode.

"The interstate tentacles of this octopus known as 'organized crime' or 'the syndicate' can only be cut by making it a Federal offense to use the facilities of interstate commerce **in the carrying on** of these nefarious activities.

"The bill will assist local law enforcement by denying interstate facilities to individuals engaged in illegal gambling, liquor, narcotics or prostitution business enterprises. Testimony produced at the hearings clearly dem-

onstrated the interstate network of criminals engaged in such unlawful activities. It further demonstrated the need for the assistance of the Federal Government in view of the fact that law enforcement authorities are limited and hindered by the interstate nature of these activities . . .'' (Emphasis added.)

Office of the Attorney General,
Washington, D. C., April 6, 1961.

''The Speaker
House of Representatives
Washington, D. C.

''Dear Mr. Speaker: Enclosed for your consideration and appropriate reference is draft legislation to amend Title 18, United States Code, to prohibit travel in aid of racketeering enterprises.

''Over the years an ever-increasing portion of our national resources has been diverted into illicit channels. Because many rackets are conducted by highly organized syndicates whose influence extends over State and National borders, the Federal Government should come to the aid of local law enforcement authorities in an effort to stem such activity.

''The bill which I submit to the Congress would impose criminal sanctions upon the person whose work takes him across State or National boundaries in aid of certain 'unlawful activities.' These are defined in the bill as business enterprises involving gambling, liquor, narcotics, or prostitution activities which are offenses under Federal law or the law of the State where they are committed, and extortion and bribery. The bill would also have the effect, through its interaction with Section 2 of Title 18, United States Code, of prescribing penalties for persons who send others on similar missions. Such violations would be punishable by a fine as high as $10,000 or a prison term of up to 5 years, or both.

"The effect of this legislation would be to impede the clandestine flow of profits from criminal ventures and to bring about a serious disruption in the far-flung organization and management of coordinated criminal enterprises. It would thus be of material assistance to the States in combating pernicious undertakings which cross State lines.

"The Bureau of the Budget has advised that there is no objection to the submission of this recommendation.

'Sincerely,

'Robert F. Kennedy,
Attorney General."

All of this would indicate that Congress was attempting to stop organized interstate crime where the activity in interstate commerce aids the criminal activity and local law enforcement is unable to cope with it.

Does the Act cover the situation where the interstate activity does not itself directly further criminal activity? As for example, in our case, appellant brings his family into Tennessee, intending thereafter to start up an unlawful activity. The government says 'yes' and that the later violation or attempted violation of state law is a valid basis for regulation of interstate commerce. This is the basic flaw in this Act if the government is correct. It is clear that the only thing that differentiates lawful or unlawful activity under the government's theory is a purely local Act which has not even an indirect bearing on interstate commerce, but which, of necessity, must occur after all interstate activity ceases. It is important to keep in mind that merely traveling with the intent is not a crime under the Act.

It is also important to note that there is no time specified in the Act as to how soon after the interstate travel the act to violate state law must occur. If the government

is correct, a citizen could cross a state line intending to violate a state law, could then live in that state for 10, 20 or 30 years, could travel intrastate and to many other states and return and if he thereafter carried out his original intention, he would be guilty of a violation.

If the Act read merely 'traveling with intent', it would be different, but here an essential element of the offense is the violation or attempted violation of state law unconnected in any way to the travel.

The rules of construction of criminal statutes, the title of the act, the legislative history all indicate the act does not cover appellant's situation. Also, if possible, laws should be construed so as to be constitutional and to apply this law to appellant as the government seeks would be unconstitutional.

It is obvious that if so construed, the Act would be unconstitutional on its face as an essential element of the federal offense, violation or attempted violation of a state law, has no relationship to interstate commerce and would be an attempt by Congress to exercise authority it does not have.

Carter v. Carter Coal Co., 298 U. S. 238;
N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1;
Schechter Poultry Corp. v. United States, 295 U. S. 495.

Many other countries restrict and limit travel of its citizens in their own country, but we have always recognized that our citizens are free to move from one community to another without governmental regulation. If this act stands, as interpreted by the government and the Court of Appeals for the Sixth Circuit, anyone who wishes to move from one state to another who has ever engaged in gambling, will fear to do so.

He may have a new job or other incentive to move, beneficial to himself, his family and society, but will be unable to risk moving because he knows if he gambles, even 10 or 20 years later, he can be prosecuted under the government's interpretation of this Act. He will become a virtual prisoner in the state in which he now lives. To stop interstate travel, not in itself in furtherance of an unlawful activity, so as to imprison a man in one state, is a denial of all due process and beyond the authority of Congress under any provision of the Constitution.

CONCLUSION.

For the reasons stated, the petition for certiorari should be granted in order to permit this Court to resolve a conflict between two circuits and to resolve an important question of Federal law which has not been, but should be, settled by this Court.

Respectfully submitted,

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APPENDIX.

(Filed Aug. 4, 1966, Carl W. Reuss, Clerk.)

No. 16575

United States Court of Appeals
For the Sixth Circuit.

United States of America, Plaintiff-Appellee, v. Billy Gene Compton, Defendant-Appellant.	On Appeal from the United States District Court for the Western District of Tennessee, Western Division.

Decided August 4, 1966.

Before: Weick, Chief Judge, Phillips, Circuit Judge, and Cecil, Senior Circuit Judge.

Cecil, Senior Circuit Judge. This is an appeal by Billy Gene Compton, defendant-appellant, from a judgment of conviction in the United States District Court for the Western District of Tennessee, Western Division. Compton, whom we will call defendant, was charged in a three count indictment with a violation of Section 1952,[1] Title

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[1] "(a) Whoever travels in interstate or foreign commerce • • • with intent to—

(1) distribute the proceeds of an unlawful activity; or

• • • • • • • • •

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), • • • and (3), shall be fined not

18, U. S. C. Count one charged the substantive offense and, in brief, was to the effect that the defendant traveled in interstate commerce from the State of Arkansas to the Western District of Tennessee with intent to promote, manage and establish a gambling business in the State of Tennessee in violation of the laws of that state. Count two charged that the defendant induced David McElduff to commit the same offense. Count three was a similar charge in relation to the inducement of Donald Crossley.

The case was tried to a jury and the defendant was found guilty on count one. The trial judge directed a verdict of acquittal on count three and the jury returned a verdict of not guilty on the second count. Judgment was entered upon the verdict and the defendant was sentenced to a term of imprisonment for five years and to pay a fine of $5,000. This appeal followed.

The facts for the purpose of this appeal may be briefly stated. The defendant moved his family from West Memphis, Arkansas, to Shelby County, Tennessee, on or about November 20, 1963. A few days later he took over the operation of a gambling club, which he called Valley Club, in Tipton County, Tennessee. The principal issue at the trial was whether the defendant in moving or traveling to Tennessee had the intent to engage in a gambling business in violation of the laws of Tennessee. There was sufficient circumstantial evidence from which the jury could infer this intent. No assignment of error is based on the insufficiency of the evidence to support the verdict. We will not further discuss the evidence. A similar case in which we sustained a verdict of guilty was recently

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more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling * * * offenses in violation of the laws of the State in which they are committed or of the United States, * * *"

before this Court. **United States v. Woodrow Wilson Compton,** 355 F. 2d 872, cert. den. ... U. S. ..., 34 LW 3397 (May 24, 1966).

The defendant states ten questions or assignments of error as being involved on this appeal. Six of them relate to the conduct of the trial and four relate to the constitutionality of Section 1952, Title 18, U. S. C. We find no merit to the constitutional questions. Neither do we find that the trial judge exceeded the bounds of propriety of a trial judge in asking questions of witnesses or that he abused his discretion in this respect.

One assignment of error relates to an altercation witness James E. Knight had with the defendant at Valley Club. An argument ensued between them concerning the way Knight was throwing the dice and the defendant ejected Knight from the Club. There was a scuffle and the defendant possibly had a chain in his hand. One of the issues in the case was whether the defendant was operating a gambling club. The incident over which the argument arose was pertinent to that issue. The argument and the ultimate ejectment were part of one incident and so closely related to the issue that it could not be separated into two parts. We find no prejudicial error as a result of this altercation and the alleged assault on the witness Knight.

Another assignment of error relates to a question government counsel asked the defendant on cross-examination concerning his brother's operation of a club. The trial judge ruled that this could have a bearing on the question of intent of the defendant. There may have been a very thin line here between competency and incompetency but we cannot say that the trial judge abused his discretion in admitting the testimony.

An assignment of error by which it is claimed that the appellant was deprived of a fair trial relates to a state-

ment made by one of government counsel in his argument to the jury concerning the refusal of witness McElduff to answer a question on the ground of self incrimination. Since the appellant was acquitted on the second count of the indictment relating to McElduff, we find no prejudicial error on this assignment.

We find no merit to the claim that the trial judge did not define the Tennessee statutes which the appellant was accused of violating. These statutes were read to the jury. They were clear and understandable. In the record before us, it appears that no request was made to the trial judge to define them further.

Finally it is claimed that the trial court erred in permitting government counsel to call witnesses whom they knew would refuse to testify on the ground of self incrimination. This is known in common parlance as "taking the Fifth." The Fifth Amendment to the Constitution of the United States provides, "No person * * * shall be compelled in any criminal case to be a witness against himself, * * *"

This assignment of error relates to two witnesses called by the government, Keyes Outland and Charles Cleveland Belt, Jr. These witnesses appeared in court with their lawyers who advised the court and government counsel that the witnesses would claim their privilege against self incrimination and would refuse to testify. Notwithstanding this advice the witnesses were called to the witness stand.

This is a trial device frequently used by government counsel in the trial of criminal cases. This provision of the Fifth Amendment against self incrimination, which we will refer to as a privilege, is a personal one. **Rogers v. United States**, 340 U. S. 367, 371, rehearing den. 341 U. S. 912; **United States v. White**, 322 U. S. 694, 699; **United States v. Goldfarb**, 328 F. 2d 280, 282, C. A. 6, cert. den.

377 U. S. 976. The witness can claim it only for himself and to a large extent the witness must be the final judge of whether an answer to a propounded question would tend to subject him to prosecution (**In Re Atterbury**, 316 F. 2d 106, 109, C. A. 6; Case No. 14,692e, **United States v. Burr, In re Willie**, 25 Fed. Cas. 38, 40; **United States v. Coffee**, 198 F. 2d 438, 440, C. A. 3) under either federal or state law. **Murphy v. Waterfront Comm'n**, 378 U. S. 52, 77-78. The witness has a right to seek legal counsel and to have his lawyer accompany him to court.

This privilege cannot be used by a witness as a shield to refuse to answer all questions such as the name and address, for instance. Rarely could such answers subject a witness to prosecution. The witness can be required to answer pertinent questions where it appears obvious that no self incrimination would be involved. Within limits the trial judge may require the witness to answer a question where it can be reasonably determined that there would be no possible relationship to criminal prosecution. **Hoffman v. United States**, 341 U. S. 479, 486; **Mason v. United States**, 244 U. S. 362, 365; **Enrichi v. United States**, 212 F. 2d 702, 703-4, C. A. 10. This matter may be and frequently has been ultimately determined by contempt proceedings. **Hoffman v. United States**, supra; **Rogers v. United States**, supra; **United States v. White**, supra; **In Re Atterbury**, supra.

Government counsel need not refrain from calling a witness whose attorney appears in court and advises court and counsel that the witness will claim his privilege and will not testify. However, to call such a witness, counsel must have an honest belief that the witness has information which is pertinent to the issues in the case and which is admissible under applicable rules of evidence, if no privilege were claimed. It is an unfair trial tactic if it appears that counsel calls such a witness merely to get

him to claim his privilege before the jury to a series of questions not pertinent to the issues on trial or not admissible under applicable rules of evidence.

It is not necessary to analyze here all of the questions asked both of the witnesses with whom we are concerned. It will suffice to consider principally one phase of the examination of Charles Cleveland Belt, Jr.

After the name and address the first two questions asked the witness were whether he knew certain F. B. I. agents and whether he gave an oral interview to Norman Casey and Special Agent Canale on February 2, 1964. The next question was,

> "Mr. Belt, have you ever made this statement, or this statement in fact or in substance, to any person: That you had made several thousand dollars in the operation of the Five Gables night club in Shelby County— * * * and had also made money in the operation of a liquor store in Memphis, Tennessee?"

To all of these questions the witness claimed the privilege against self incrimination. Government counsel said, "I believe if you will let me finish, we will get through a little faster."

Then, under the guise of a question, counsel proceeded to apparently read from a purported statement given by the witness to Norman Casey and Special Agent Canale. The "question" reads as follows:

> "Did you open a gambling establishment in Tipton County, Tennessee at the site of the old Bon Ton Club, and operate it afterwards for almost a month, around November 13, 1963, to the termination of that activity was caused by the loss of your money? That after you lost your money there, principally from the gambling up there, the shooting of dice, you tried to salvage what you could from the place, you re-

moved ice machines, chairs, tables and couches which you had brought and placed in that establishment. And there has been a lawsuit between you and Red Nix as to whether or not you could remove the carpet from the floors of that gambling establishment. That you went to the Paddock Club prepared to remove the rug with a writ of replevin—a writ of replevin—and that you had gone before the Tipton County Judge, and the Judge had told you it might be necessary to get a writ of replevin in order to remove the rug, and that you went and got it in order to remove the rug.

"That you were accompanied there by Sheriff Ben Billings and Constable Doug Williams. That when you arrived at the club, Billy Gene Compton was at the club, as was Keyes Outland."

Counsel objected to the reading of the statement and the trial judge sustained the objection.

Counsel from the beginning treated this witness as a hostile witness under cross-examination. His approach to questioning the witness was improper. The witness was called by the government and, if he had knowledge pertinent to the issues, counsel should have brought it out by direct questions without reference to the statement given to the F. B. I. He might ultimately have been able to use the statement for impeachment purposes. If proper questions had been asked and the claim of privilege had been sustained, counsel would never have had occasion to use the statement.

Further the subject matter of the statement is wholly unrelated to the crime charged against the appellant. We are unable to see any connection between the operation of the Five Gables night club in Shelby County and the Valley Club in Tipton County operated by the defendant. We can see no possible relation between the issues in the case at bar and the witness making money out of the opera-

tion of a liquor store in Memphis. The reading, under the guise of a question of the long statement alleged to have been given to the F. B. I. Special Agent was not only improper from a procedural point of view but the substance was incompetent as not being pertinent to the issues in the case. Only the last sentence with reference to whether Billy Gene Compton was at the club when he arrived there might have some bearing on the case. This could have been asked of the witness in a simple direct question.

Other questions were equally improper. For instance:

> "Did you lose twenty-five thousand dollars in a gambling establishment in Tipton County, Tennessee in November of 1963—October and November?" and "While you were there operating the Valley Club in Tipton County, Tennessee, in November and October of '63, did you maintain any firearms on the premises?"

No motion for mistrial was made and the question was not raised on motion for new trial. We conclude, however, that the examination of the witnesses Outland and Belt was prejudicial to the defendant and that this deviation from proper trial procedure constituted plain error and that it affected the defendant's substantial rights. (Rule 52, F. R. Cr. P.) Cf. **United States v. Terry**, F. 2d, No. 16768, decided by this Court July 6, 1966, in which we sustained the practice adopted by the trial judge in permitting the examination of a witness whom the Court was advised would refuse to testify on the ground of self-incrimination.

Counsel for the government argue:

> "A reading of the record as a whole shows beyond doubt that all points relevant to Compton's conviction on Count One of this indictment were established

by other evidence, and the jury need have drawn no inferences whatever from the refusals to answer by Outland and Belt in order to convict."

There may be some merit to this argument, but counsel should have thought of this before indulging in this type of practice. We cannot ignore prejudicial testimony merely because guilt seems obvious. We cannot tell what may tip the scales in the mind of a jury.

By reason of this prejudicial trial tactic we must reverse the judgment of the District Court and remand the case for a new trial.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 516

BILLY GENE COMPTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1966. The petition for a writ of certiorari was filed on September 3, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 18 U.S.C. 1952, in punishing interstate travel with intent to promote or establish an illegal gambling enterprise, is within the constitutional power of Congress.

STATUTE INVOLVED

18 U.S.C. (1964 ed.) 1952, as amended, provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States,

or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

* * * *

STATEMENT

After a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of having traveled from Arkansas to Tennessee with intent to promote a gambling enterprise unlawful under the statutes of Tennessee, and of having thereafter carried on such unlawful enterprise, in violation of 18 U.S.C. 1952.[1] He was sentenced to imprisonment for five years and to pay a $5,000 fine (R. 5-8). The court of appeals sustained the constitutionality of Section 1952, but reversed petitioner's conviction on the ground of improper questioning by the prosecutor and remanded for a new trial.

ARGUMENT

There is no occasion for review of the interlocutory decision of the court of appeals. The constitutionality of Section 1952—uniformly and repeatedly upheld by the lower federal courts[2]—presents no substantial

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[1] Petitioner was also charged with aiding and abetting the interstate travel for such illegal purpose of two employees. As to one count so charging the court directed a judgment of acquittal; as to the other the jury acquitted.

[2] See *United States* v. *Zizzo*, 338 F. 2d 577 (C.A. 7), certiorari denied, 381 U.S. 915; *Turf Center, Inc.* v. *United States*, 325 F. 2d 793 (C.A. 9); *Bass* v. *United States*, 324 F. 2d 168 (C.A. 8); *Marshall* v. *United States*, 355 F. 2d 999

question. The power of the federal government to regulate interstate commerce in support of the public policy of the States is well established (see, *e. g., Lottery Case*, 188 U.S. 321, 356-364; *Hoke* v. *United States*, 227 U.S. 308, 320-323; *Caminetti* v. *United States*, 242 U.S. 470), and no conceivable question under the Double Jeopardy Clause is raised since it was not necessary that petitioner be convicted in a State court in order to be convicted under Section 1952.

Moreover, here, as in *United States* v. *Compton*, 355 F. 2d 872 (C.A. 6), certiorari denied, 384 U.S. 951—a case almost identical in its facts—the evidence establishes that the questioned travel was directly and immediately related to the establishment of the unlawful enterprise.[3] Whatever problems may be pre-

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(C.A. 9); *United States* v. *Borgese*, 235 F. Supp. 286 (S.D. N.Y.); *United States* v. *Teemer*, 214 F. Supp. 952 (N.D. W. Va.); *United States* v. *Ryan*, 213 F. Supp. 763 (D.C. Colo.); *United States* v. *Barrow*, 212 F. Supp. 837 (E.D. Pa.); *United States* v. *Smith*, 209 F. Supp. 907 (E.D. Ill.).

[3] The evidence showed that a gambling operation in West Memphis, Arkansas, in which petitioner was a silent partner was raided by State authorities in July 1963. Shortly thereafter, petitioner listed his West Memphis home for sale (R. 31-32, 38-41, 153-155, 191-192). On November 14, 1963, petitioner went to Memphis where, he testified, that he discussed with one friend the possibility of going into the used-car business and with another the "Paddock Club" which that friend was building (R. 131-135). The following day, petitioner rented a truck at his own expense and moved some restaurant equipment into the Paddock Club (R. 138-140). On November 20, 1963, petitioner moved himself and his family from West Memphis, Arkansas to Memphis, Tennessee. Petitioner opened the club on December 2, 1963. He changed

sented in a case where the relationship between the interstate travel and the unlawful enterprise is tenuous (see *United States* v. *Hawthorne*, 356 F. 2d 740, 742 (C.A. 4), certiorari denied, 384 U.S. 908) are thus not involved. The government's case was not bottomed on any theory that interstate travel by one engaged in an illegal enterprise is, without more, a violation of Section 1952. A jury could reasonably conclude that the travel here was for the specific purpose of engaging in an unlawful gambling enterprise. There is accordingly no basis for the contention that petitioner cannot constitutionally be tried for violation of Section 1952 in the circumstances of this case.[4]

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its name to "Club Valley" and operated it as a gambling establishment for shooting dice until the latter part of February 1964 (R. 140-143).

[4] Petitioner does not advance his position by arguing (Pet. 8) that he could as conveniently have operated the new establishment from his home in West Memphis. If petitioner had maintained his residence in Arkansas and journeyed each day to Tennessee, he would clearly have violated the statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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